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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

In the Matter

—of—

PATIO CAFE, INC.,

Bankrupt.

EMPIRE STATE CHAIR CO., INC.,

Petitioner,

—against—

GEORGE J. BELDOCK, Trustee in Bankruptcy,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(Appellee below)

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Respondent.
(Appellant below)

BRIEF OF RESPONDENT

Statement.

The petitioner and the bankrupt entered into an agreement in writing for the construction of a restaurant bar and grill at 630 Flatbush Avenue, Brooklyn, N. Y., and under the terms of which contract, the petitioner was to "provide all the materials and perform all the work * * * as

shown on the plan and described in the specifications which are annexed hereto and are identified by the signatures of the parties hereto and become hereby a part of this contract" (fol. 35).

Under the terms of the said contract, the bankrupt agreed to pay to the petitioner \$24,500. at stated times as the work progressed.

The contract also contained the following statement:

"It is understood and agreed that title and ownership to all the chattels and fixtures described in the specifications hereto, shall remain in the contractor at all times until the said purchase price * * * shall have been fully paid in cash" (fol. 39).

Upon completion of the work, the agreement (fol. 34) was filed in the office of the Register of Kings County on April 20th, 1942. It is conceded that the agreement as filed with the Register did not have annexed to it the plans and specifications mentioned in the contract (fol. 89).

On December 22nd, 1942, and at a time when the bankrupt was in default in making payments to the petitioner, the bankrupt executed an assignment for the benefit of creditors to one Simon Goldman, pursuant to the Laws of the State of New York.

Thereafter, and on January 5th, 1943, an involuntary petition in bankruptcy was filed against the bankrupt and an adjudication in bankruptcy followed in due course. The Receiver appointed by the District Court took into his possession chattels claimed by the petitioner. Subsequently, and pursuant to leave obtained by the Bankruptcy Court, the Receiver sold the chattels to the petitioner free and clear of any claims or liens for the sum of \$5800. The order authorizing the sale, transferred the lien, if any, of the petitioner to the proceeds of the sale and which proceeds were

received by the trustee pending the determination of the validity of the contract and the claim of the petitioner thereto (fol. 148).

A hearing was thereafter had before the Referee pursuant to the order of the District Court (fol. 79) and the Referee thereafter filed his report upholding the lien of the petitioner (fol. 112) and which report was thereafter confirmed by the District Court by an order made on the 12th day of April, 1943 (fol. 136).

The Trustee in Bankruptcy thereupon appealed to the Circuit Court of Appeals for the Second Circuit, which after argument, rendered its opinion (fols. 61 to 64) and entered a decree reversing the order of the District Court and remanded the proceeding to the District Court with instructions to dismiss the reclamation petition of the petitioner (fol. 75).

Statute Involved.

The Statute involved is Section 65 of Article 4 of the Personal Property Law of the State of New York, which provides as follows:

“Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of any provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or copy thereof shall be filed as hereinafter provided, *unless such contract or copy* is so filed within ten days after the making of the conditional sale. This section shall not apply to conditional sales of goods for resale.”
(Emphasis ours.)

Answer to the Petition for Writ of Certiorari.

In the Court below, the Trustees urged among other things, that the agreement (Exhibit, fols. 34 to 53) between the petitioner and the Bankrupt had not been filed as required by Section 65 Article 4 of the Personal Property Law of the State of New York and is therefore void against the Trustee in Bankruptcy.

The instrument as filed concededly did not have annexed to it the plans and specifications which were specifically a part of the contract between the appellee and the bankrupt (fol. 35). The instrument, as filed, was therefore not the contract between the parties or a true copy thereof that is required to be filed under the statute as it lacked a material and essential part of the contract, viz., the plans and specifications, and therefore, the filing of the instrument without the plans and specifications was not a proper compliance with the statute. Hence, the requirement, in the Statute that the *contract or a copy* thereof should be filed was not fulfilled.

The Court below sustained this contention and has found that contract as filed without the plans and specifications was not an adequate filing under Section 65 of the Personal Property Law and was therefore void as against the Trustee. As authority for its decision, the Court below, cited *Salkin v. Dubois* (3rd Circuit), 105 F. 2nd 640 affirming *In re: Mineral Lac Paint Co.*, D. C. E. D. Pa., 17 F. Supp. 1, and *In re: Smith*, D. C. E. D. Pa., 19 F. Supp. 597.

The petitioner now urges that the Court below erred in its decision in that it failed to differentiate between the Pennsylvania Statutes and the New York Statutes relating to conditional sales agreements claiming there is a fundamental difference between them. The claimed distinction is that the Pennsylvania Statute covering conditional sales agreements require "a brief description of the goods" where-

as the New York Statute does not. Therefore, it is urged that the Pennsylvania cases cited by the Court below are not controlling and cannot be properly used as a precedent in the instant case as these cases apply only to the Pennsylvania Statutes and not to the New York Statutes.

It is respectfully submitted that the petitioner's contentions are erroneous. The District Court in *In re: Mineral Lac Paint Co.*, *supra*, affirmed; in *Salkin v. Dubois*, *supra*, construed Section 402 of Title 69, Pennsylvania Statutes (Uniform Conditional Sales Act).

A reading of that statute shows no difference whatsoever between the two statutes. Section 402 of Title 69 Pennsylvania Statutes (Uniform Conditional Sales Act) adopted May 12, 1925 is identical word for word with Section 65 of Article 4 of the Personal Property Law of New York, except that it does not contain the last sentence of Section 65. Both Statutes require that the contract or a copy of the contract be filed in order to be effective against purchasers or lienors.

Section 407 of Title 69 Pennsylvania Statutes and Section 70 of Article 4 of the Personal Property Law of the State of New York supplement Section 402 and Section 65 respectively and provide for the mechanical details of filing conditional sales agreement required to be filed.

The only reference to a description is in Section 407 where the filing officer is required to enter "a brief description of the goods" in his dockets whereas in Section 65, the filing officer is not required to make such entry in his dockets. It has been held that the actions of the filing officer do not affect or control the validity of the sale or its recording. *In re: Labb*, D. C. W. D. N. Y., 42 F. Supp. 542.

The only other reference to a description is Section 64A of the Personal Property Law enacted in 1941, which pro-

vides that conditional sales contracts for the sale of chattels not exceeding \$1,500.00, shall contain "a description of the goods sold". This section was intended to correct abuses that arose in connection with the sale of household furniture and personal property through installment sales and provide further protection and safeguard to small installment buyers and has no application to chattels sold for business or commercial purposes such as here.

It is apparent therefore that neither the States of Pennsylvania nor New York (except as indicated) require a conditional sales contract to be filed with a description of the chattels involved, but they do however require that the contract itself or a copy thereof be filed with the recording officer.

It has been held in similar situations in various Circuits where a material part of the contract was not filed, that such filing was not effective against a trustee in bankruptcy.

See

In re: Bazemore, D. C. N. D. Ala., 189 Fed. 236;

In re: Ford Rennie Leather Co., D. C. Del., 2 F. (2nd) 750-756;

Meier & Frank Co. v. Sabin (C. C. A.), 9th Circuit 214 Fed. 231;

In re: Savage Bakery Co., 259 F. 976.

The Circuit Court very properly applied the decision relating to the Pennsylvania statutes to the case at bar, as the statutes involved are identical.

The petitioner has made mention that the State of Washington has adopted the Uniform Conditional Sales Act (page 9—Pet.) and that its statutes covering conditional sales agreements are similar to the New York Statute (page 3—Pet.). These statements are erroneous. The State of Washington has not adopted the Uniform Conditional Sales Act,

has, however, a recording statute which is entirely different from the New York Statutes. (See Section 3790, *Wilmington Compiled Statutes*.)* The petitioner has cited *Ammond Iron Works v. Werly*, 135 Wash. 228, 237 Pac. 313, which he claims is in contradiction to the Pennsylvania cases cited by the Court below. As the Court below has stated, that case "turns rather upon the question of the sufficiency of the description as do the other cases cited by the appellee than upon the point of filing the entire contract" (fol. 63). The case is distinguished from the Pennsylvania cases in that it applied to a local recording statute which is entirely different from the New York and Pennsylvania statutes.

The petitioner further urges that the Court below erred in failing to follow numerous decisions cited by him which hold, that where the agreement contains "a key to the description" or "suggests a course of inquiry which if followed would supply the description", such agreement is valid. While these cases may be some authority in those states that require the contract to contain a description of the chattels covered, in order to be effective, they have no bearing on the case at bar. The adequacy of the description is not involved. The sole question here presented, is did the petitioner comply with Section 65 of the Personal Property Law of New York, which provides that the CONTRACT and a COPY thereof be filed in order to be valid. The Court below has properly found that the contract as filed by the petitioner did not meet the requirements of the statute in that a material part of the contract was omitted when filed. Assuming arguendo, that the adequacy of the description of the chattels covered by the contract is involved, it is

* The Uniform Conditional Sales Act has been adopted with slight variations in Alaska, Arizona, Connecticut, Indiana, Delaware, New Jersey, New York, Pennsylvania, South Dakota, Tennessee, West Virginia and Wisconsin.

respectfully submitted that the cases cited by the petitioner are not decisive. In all those cases there was some description or mention made of the specific chattels covered although they were inadequately described. In *Diamond Iron Works v. Werly*, *supra*, relied on by the petitioner, the memorandum of sale described the property "as machinery as per plans and specifications submitted herewith". The Court in its decision stated that in the agreed findings of fact "it appears that the description of the machinery sold would apply to and fit only shingle mill machinery sold and delivered by the respondent."

In the contract in the case at bar the property covered is not described except that reference is made to chattels and fixtures described in the specifications (fol. 39), and which specifications were concededly not filed with the contract. The contract does not describe the property with any generic term that would distinguish it from any other property or convey any notion as to what character or class of equipment it was intended to cover. It does not designate the property with any specific type or class of equipment which one might reasonably expect to find in a business such as was operated by the bankrupt. Nor does it contain any restrictive terms which would exclude any other property. The contract without the specifications is vague as to what property was intended to be covered between the petitioner and the bankrupt and contains nothing to identify the specific property to which title was intended to be reserved by petitioner. The Trustee is not charged with the duty of seeking out the petitioner or the bankrupt in order to find out what was meant to be covered by the agreement. The statute does not put any such burden on the Trustee. *Moline Plow Co. v. Braden*, 71 Iowa, 41, 32, N. W. 247. He has only to look at the terms and conditions described in the document.

The petitioner has also raised the question that a Court of Equity will not penalize him for his failure to record the complete instrument. It is a fundamental principle of law that where a statute requires a thing to be done, the statute must be complied with. In *Matter of Martina*, 39 F. Supp. 255. Here, Section 65 of the Personal Property Law made it incumbent upon the petitioner to file the contract or a copy thereof in order to make it effective and valid. In *Kenner & Co. v. Peters*, 141 Tenn. 55, 206 S. W. 188, the Court in construing a statute requiring contracts of conditional sale to be in writing, where the note, which was relied on as retaining title in its vendor, and where the space provided for a description of the property had been left blank, the Court held that it did not comply with the statute and was ineffective as a retention of title and stated: "To hold otherwise in this case would be fruitful of much mischief and that there would be no limitation or borderline in determining as to when the requirements of the Act regarding such contracts had been met. The ultimate result would be the abrogation of the statute by judicial legislation and the defeat of the legislative intent as expressed by the act in question."

CONCLUSION.

1. The Circuit Court of Appeals has properly construed Section 65, Article 4, of the Personal Property Law and its decision is not in conflict with any other Circuit Court of Appeals on the same matter.

2. The petitioner has failed to show any compelling or special or important reason for the granting of the petition for a writ of Certiorari.

3. The petition should be dismissed.

Respectfully submitted,

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Respondent.

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